

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

EVIDENT TECHNOLOGIES, INC.,

Debtor.

Case No. 09-12515

EVIDENT TECHNOLOGIES, INC.,

Chapter 11

-against-

Plaintiff,

Adversary Proceeding
No. _____

eBIOSCIENCE, INC.,

Defendant.

ADVERSARY COMPLAINT

Chapter 11 Debtor, Evident Technologies, Inc., by its attorneys, Hodgson Russ LLP, complains of Defendant eBioscience, Inc., and alleges:

1. Evident Technologies, Inc. ("Evident") filed for voluntary relief under Chapter 11 of the Bankruptcy Code on July 6, 2009 in the Northern District of New York at Albany.

2. Upon information and belief, eBioscience, Inc. is a California corporation maintaining its principal place of business at 10255 Science Center Drive, San Diego, California, 92121.

Statement as to Jurisdiction

3. This is an adversary proceeding brought for declaratory relief fixing the rights and claims of eBioscience, Inc. against the Debtor following the Debtor's rejection of an Exclusive License Agreement and Supply Agreement with eBioscience, Inc. and eBioscience, Inc.'s

declaration of its intent to maintain the Exclusive License for technology pursuant to 11 U.S.C. §365(n).

4. The Debtor therefore asserts that there is jurisdiction in the Bankruptcy Court to hear and determine this matter pursuant to 28 U.S.C. §151 and §157(b)(2)(A), (B), (I) and (O).

5. Evident further alleges that the matters to be determined in this adversary proceeding constitute a core proceeding pursuant to 28 U.S.C. §157(b).

Statement as to Venue

6. Evident's Chapter 11 bankruptcy proceeding is pending in the Northern District of New York at Albany, New York.

7. The issues raised in this adversary proceeding arose from the Debtor Evident's rejection of an Exclusive License Agreement and Supply Agreement with defendant eBioscience, Inc.

8. Accordingly, since this adversary proceeding arises in a Chapter 11 proceeding and is related to the Chapter 11 proceeding of Evident, venue is proper in this Court pursuant to 28 U.S.C. §1409.

Statement of Claim

9. On February 24, 2010, Evident made application pursuant to 11 U.S.C. §365 to reject an Exclusive License Agreement and Supply Agreement with eBioscience, Inc.

10. eBioscience, Inc. filed a written response agreeing to the rejection but declaring that it would exercise its rights under 11 U.S.C. §365(n) and retain its rights to the Exclusive License Agreement. A copy of its written declaration is annexed hereto as Exhibit "A".

11. By Order dated April 1, 2010, this Court granted the Application by Evident to reject the Exclusive License Agreement and Supply Agreement and approved eBioscience, Inc.'s retention of rights. A copy of that Order is annexed hereto as Exhibit "B".

12. Pursuant to 11 U.S.C. §365(n)(2), when a licensee to a rejected executory contract involving intellectual property elects to retain its rights, the licensee must make all royalty payments due and waives any right of setoff or claim for administrative priority under 11 U.S.C. §503(b).

13. Notwithstanding such election by eBioscience, Inc., and the confirmation of the Debtor's Plan of Reorganization, eBioscience, Inc. has indicated to Evident that it intends to sue Evident and does not intend to make future payments due to Evident under the rejected contracts.

14. eBioscience, Inc. therefore has indicated that it will not consider its claim discharged by the bankruptcy or barred by its election pursuant to 11 U.S.C. §365(n).

15. The Debtor therefore seeks a declaratory judgment and judgment from this Court directing:

(1) that eBioscience, Inc. is obligated to continue to make all payments due under the Exclusive License Agreement and Supply Agreement including, but not limited to, royalties, milestone payments, stock repurchase payments ("Puts") and otherwise; and

(2) declaring that eBioscience, Inc.'s claims against the Debtor were discharged upon confirmation; and

(3) declaring that eBioscience, Inc. may not set off or refuse to pay any sum due Evident; and

(4) enjoining eBioscience, Inc. from bringing any
litigation against Evident;

and for whatever further relief the Court deems just and proper.

16. The relief sought by the Debtor is pursuant to Bankruptcy Rule 7001(2), (7) and (9) and 28 U.S.C. §157(b)(2)(A), (B), (I) and (O).

WHEREFORE, the Debtor, Evident Technologies, Inc., seeks an Order from this Court directing that eBioscience, Inc. continues to make all payments due under the Exclusive License Agreement and Supply Agreement including, but not limited to, royalties, milestone payments, stock repurchase payments (“Puts”) and otherwise; declaring that eBioscience, Inc.’s claims against the Debtor were discharged upon confirmation; declaring that eBioscience, Inc. may not set off or refuse to pay any sum due Evident; enjoining eBioscience, Inc. from bringing any litigation against Evident, and for whatever further relief the Court deems just and proper.

DATED: May 5, 2010

HODGSON RUSS LLP
Attorneys for Plaintiff

By: 

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